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Nos. 86-1373 and 86-1374

In the Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF NEW YORK, ET AL., PETITIONERS

v.

LEE M. THOMAS, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO,
ET AL., PETITIONERS

v.

LEE M. THOMAS, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

CHARLES FRIED
Solicitor General

F. HENRY HABICHT II
Assistant Attorney General

DAVID C. SHILTON
ANNE S. ALMY
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

29 pp

QUESTION PRESENTED

Whether certain statements contained in letters written by a former Administrator of the Environmental Protection Agency in January 1981 (and in a press release issued by EPA at the same time) gave rise to a legally binding and non-discretionary duty on the part of the current Administrator to take regulatory action under Section 115 of the Clean Air Act, 42 U.S.C. 7415, to address the problem of acid deposition ("acid rain").

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OPINIONS BELOW

The opinion of the court of appeals (86-1373 Pet. App. A1-A8 [1]) is reported at 802 F.2d 1443. The

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[1] Hereafter, all citations to "Pet. App." refer to the appendix to the petition for a writ of certiorari in No. 86-1373.

opinion of the district court (Pet. App. A9-A29) is reported at 613 F. Supp. 1472.

JURISDICTION

The judgment of the court of appeals (Pet. App. A44-A46) was entered on September 18, 1986, and a timely petition for rehearing was denied on November 24, 1986 (Pet. App. A47). The petitions for a writ of certiorari were filed on February 23, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant portions of Sections 115 and 304 of the Clean Air Act, 42 U.S.C. 7415 and 7604, are reproduced at Pet. App. A48-A48.

STATEMENT

The Clean Air Act establishes a joint state and federal program to control the Nation's air pollution (42 U.S.C. 7401 *et seq.*). Sections 108 and 109 of the Act grant authority to the Administrator of the Environmental Protection Agency (EPA) to set national ambient air quality standards designed to limit permissible concentrations of air pollutants (42 U.S.C. 7408, 7409). Section 110 requires each State to develop a State Implementation Plan (SIP) capable of ensuring that the ambient standards will be met and maintained (42 U.S.C. 7410). Section 110 also requires the SIP to "provide [] for revision, after public hearings, of such plan * * * whenever the Administrator finds on the basis of information available to him that the plan is substantially inadequate to achieve the * * * standard which it implements or to otherwise comply with any additional requirements

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established under the Clean Air Act Amendments of 1977" (42 U.S.C. 7410(a)(2)(H)(ii)).

Interstate air pollution is addressed by Sections 110 and 126 of the Act, 42 U.S.C. 7410 and 7426. Section 110(a)(2)(E) requires each SIP to contain measures to prohibit any major source within a State from emitting any air pollutants in amounts that will "prevent attainment or maintenance by another State of any * * * standard," interfere with another State's program to prevent significant deterioration of areas having clean air, or interfere with visibility protection measures (42 U.S.C. 7410(a)(2)(E)). Section 126 of the Act in turn permits a State or other governmental entity to petition the Administrator of EPA to make a finding that sources in other States are operating (or will operate) in violation of the substantive prohibitions of Section 110(a)(2)(E).

The Act also addresses the subject of international air pollution. Specifically, Section 115 establishes a mechanism that is applicable when the Administrator, upon receipt of reports or studies of a duly constituted international agency, "has reason to believe that any air pollutant or pollutants emitted in the United States cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare in a foreign country" (42 U.S.C. 7415(a)). Subsection (a) of Section 115 provides that in such circumstances, the Administrator "shall give formal notification thereof to the Governor of the State in which such emissions originate" (42 U.S.C. 7415(a)). Subsection (b) then provides that this notification "shall be deemed to be a finding under Section 7410(a)(2)(H)(ii) of this title which requires a plan revision with respect to so much of the applicable implementation plan as is inadequate to

prevent or eliminate the endangerment" (42 U.S.C. 7415(b)). Finally, Subsection (c) limits application of this procedure to a foreign country that the Administrator determines has given the United States "essentially the same rights" as are afforded by Section 115 (42 U.S.C. 7415(c)).

2.a. The Clean Air Act makes no specific reference to the phenomenon known as "acid rain"—or, more generally, as acid deposition.[2] Acid deposition is believed to occur when emissions of sulfur dioxide, nitrogen oxides, and possibly other compounds are transported through the atmosphere, transformed by atmospheric chemical processes, and then deposited on the Earth's surface in either wet or dry form. The amount of acid material deposited in a particular area is thought to depend upon the complex interaction of these four factors—emission, transportation, transformation, and deposition. Furthermore, the sensitivity of a given area to acidification is believed to influence whether and to what extent environmental degradation may occur. The acid deposition phenomenon, involving these extremely complex processes as well as significant uncertainties, is a problem in both the United States and Canada. Pet. App. A4, A45-A46; A. Lewis & W. Davis, *Joint Report of the Special Envoys on Acid Rain* 9-20 (Jan. 1986) [hereinafter *Report*], discussed at pages 6-7, *infra*.

b. Although the Clean Air Act does not explicitly mention the issue of acid deposition, Congress did address that issue in the Acid Precipitation Act of 1980, Tit. VII, 42 U.S.C. 8901 *et seq.* In the latter

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[2] We shall use the term "acid deposition" rather than "acid rain," because acid material may be deposited in either wet or dry form.

Act, Congress found that acid precipitation "could contribute to the increasing pollution of natural and man-made water systems * * *, as well as cause other adverse effects, and "could affect areas distant from sources and thus involve issues of national and international policy" (42 U.S.C. 8901(a)(1)-(6)). Congress therefore established a 10-year comprehensive research plan to be carried out by an inter-agency body known as the Acid Precipitation Task Force (42 U.S.C. 8902). Congress specified that the Task Force's plan shall include programs for, inter alia, "identifying the sources of atmospheric emissions contributing to acid precipitation," determining "the processes by which atmospheric emissions are transformed into acid precipitation," developing "models to enable prediction of longrange transport of substances causing acid precipitation," and identifying "areas at risk" from acid precipitation (42 U.S.C. 8903(b)(1), (3), (4), and (5)). In addition, the plan must include programs for cooperation "with the affected and contributing States and with other sovereign nations having a commonality of interests" (42 U.S.C. 8903(b)(11)).

c. The United States and Canada also have taken bilateral steps to address the acid deposition issue. In 1978, the two Nations established Bilateral Research Consultation Groups to report on the extent and significance of long-range air pollution problems. PX J. Thereafter, on August 5, 1980, the two Nations entered into a Memorandum of Intent "to develop a bilateral agreement * * * to combat transboundary air pollution." C.A. App. 64-67. Scientific and technical working groups were established to furnish advice in that process. Although a bilateral air quality agreement was not reached, there was considerable scien-

tific and diplomatic activity pursuant to the Memorandum of Intent. *See, e.g., id.* at 140-177.

In March 1985, following their annual meeting to discuss various bilateral issues, President Reagan and Prime Minister Mulroney jointly recognized acid deposition as a serious concern affecting bilateral relations. In response to that recognition, the President and the Prime Minister each agreed to appoint a Special Envoy to examine the issue and to report back before the next meeting of the President and Prime Minister in the Spring of 1986. The Special Envoys-Andrew Lewis, the former Secretary of Transportation, and William Davis, the former Premier of Ontario—were charged with taking steps to enhance cooperation in research and the exchange of information, to identify efforts to improve the environment of the two Nations, and to "pursue consultation on laws and regulations that bear on pollutants thought to be linked to acid rain." *United States-Canada Consultations on Acid Rain*, 21 Weekly Comp. Pres. Doc. 318 (Mar. 17, 1985).

The Special Envoys submitted their report to the President and Prime Minister on January 8, 1986. *United States-Canada Report on Acid Rain*, 22 Weekly Comp. Pres. Doc. 30. The report, known as the *Joint Report of the Special Envoys on Acid Rain* [hereinafter *Report*], is reproduced as an addendum to the government's brief in the court of appeals. The *Report* explains that, under the Clean Air Act, the United states has taken significant steps to control emissions of sulfur dioxide and nitrogen oxides, by imposing ambient air quality standards and by imposing emission standards for new stationary sources (such as powerplants and industrial boilers) and new mobile sources (such as automobiles and light trucks). These measures have resulted in a reduction of 28%

in emissions of sulfur dioxide since 1973 and the prevention of any increase in emissions of nitrogen oxides since 1970. *Id.* at 20-22. However, recognizing that the currently available options for further reducing emissions that contribute to acid deposition suffer from serious technical limitations or socioeconomic costs (*id.* at 8, 23-24), the *Report* does not recommend that extensive new control programs be initiated at this time. Instead, the *Report* recommends that the United States Government and businesses commit a total of $5 billion for development and demonstration of control technologies, and that the United States and Canada continue their cooperative efforts with respect to acid deposition (*id.* at 41-51).

The President and Prime Minister endorsed the *Report* and its recommendations at their annual meeting in Washington on March 19, 1986. *United States-Canada Agreements*, 22 Weekly Comp. Pres. Doc. 388-389. A statement issued by the White House in connection with that endorsement reported that in fiscal years 1981 through 1985, $2.2 billion in research funds had been allocated in the United States to develop technologies for the cleaner utilization of coal, and that additional public and industry funding would be forthcoming for those purposes (22 Weekly Comp. Pres. Doc. 389-390). More recently, on March 18, 1987, the President announced several additional steps to ensure that the United States continues to work closely with the Canadian Government to seek a solution to the acid rain problem. *Acid Rain*, 23 Weekly Comp. Pres. Doc. 269-270 (Mar. 18, 1987). The President stated that he would request from Congress the appropriation of the full $2.5 billion recommended by the Special Envoys to fund the Federal Government's share of a joint research program with industry. The President also

requested the Vice President to have the Task Force on Regulatory Relief undertake a study of incentives and disincentives to the deployment of new emission control technologies and possible regulatory revisions to address that subject. The findings of that study, along with any proposed revisions in existing regulations, are to be reported to the President within 6 months. *Ibid.*

3. This case arises out of the efforts by petitioners to require the Administrator of EPA to address the acid rain issue through immediate regulatory action under Section 115 of the Clean Air Act, without waiting for concrete results of the substantial research efforts that have been undertaken by the United States in accordance with the Acid Precipitation Act of 1980 and the bilateral discussions between the United States and Canadian Governments on the acid deposition issue. Petitioners contend that several letters and a press release written by a former Administrator of EPA in January 1981—which, as the court of appeals observed, was "only days before President Reagan took office" (Pet. App. A3)—impose a mandatory duty on the current Administrator to take regulatory action.

a. On January 13, 1981, the outgoing Administrator of EPA, Douglas Costle, sent letters to the then-Secretary of State, Edmund Muskie, and to Senator Mitchell of Maine regarding the acid deposition issue (Pet. App. A30-A41). In his letter to Secretary Muskie, Administrator Costle reviewed recently enacted Canadian legislation and concluded that it "provides the Government of Canada with authority to give the United States essentially the same rights as Section 115 of the Clean Air Act gives to Canada" (*id.* at A30). Costle also noted that he had reviewed

the Seventh Annual Report on Great Lakes Water Quality, which had been issued by the International Joint Commission in October 1980. He stated that that report "confirms that acid deposition is endangering public welfare in the United States and Canada and that United States and Canadian sources contribute to the problem not only in the country where they are located but also in the neighboring country" (*id.* at A33).

Costle elaborated on these views in his letter to Senator Mitchell. He observed that "[s]urveys conducted over the past several years establish that there is a significant flow of these pollutants across the United States-Canadian border in both directions" (Pet. App. A36). "Thus," he stated, "we can say with some certainty that emission sources in the United States contribute significantly to the atmospheric leadings over some sensitive areas in Canada" (*ibid.*). Against this background, Costle expressed his "belie[f] that the Section 115 authority could appropriately be used to develop solutions" to the problem (*ibid.*). Costle recognized, however, that "Section 115 is activated by giving formal notification to the Governor of a specific State" and that "EPA has not yet determined which State or States will require notification under Section 115" (*id.* at A40). He further stressed that EPA would be required to "make extraordinary efforts to consult and cooperate with affected States in this process," because the acid rain problem "crosses numerous State boundaries" and because "there are no established numerical standards by which to assess the adequacy of acid deposition mitigation measures" (*id.* at A41).

b. Administrator Costle's two letters were sent without public notice, opportunity for public comment, or other procedural formalities. However, EPA did

issue a press release on January 16, 1981, which summarized the contents of the letters. In the Spring of 1981, Governor Rhodes of Ohio wrote to the new EPA Administrator, Anne Gorsuch, seeking clarification of the status of the press release. By letter dated September 22, 1981, Administrator Gorsuch responded by stating that in her view, "[t]he only way to initiate a section 115 proceeding is by making the necessary findings under subsection 115(a) and formally notifying the Governor of a State" (C.A. App. 137). For this reason, she concluded, "no Section 115 proceeding was commenced" by the January 1981 press release (*ibid.*). Administrator Gorsuch further explained that the press release was only "a general announcement of former Administrator Costle's belief that some preconditions to action under section 115 had been met" (*ibid.*).[3]

c. By letter dated January 12, 1984, the petitioners in No. 86-1373 gave notice of their intent to sue the Administrator of EPA under Section 304(a)(2) of the Clean Air Act, 42 U.S.C. 7604(a)(2), which permits such suits where "there is alleged a failure of the Administrator to perform any act or duty under [the Clean Air Act] which is not discretionary with the Administrator." Petitioners main-

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[3] On March 17, 1981, the State of Ohio and two electric utilities filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit, challenging the letters and press release to the extent that they were intended to constitute official agency action. *Cincinnati Gas & Electric Co.* v. *EPA*, No. 81-1311 (D.C. Cir.). On October 19, 1981, the court of appeals dismissed the petitions on ripeness grounds. After the district court's decision in this case, several new petitions seeking review of the press release and Costle letters were filed. *Alabama Power Co.* v. *EPA*, No. 85-1606 (D.C. Cir.). Those petitions are still pending before the court of appeals.

tained that Administrator Costle's statements in the 1981 letters and press release had triggered a mandatory duty on the part of the present Administrator to notify the appropriate States under Section 115 of the Clean Air Act that they must modify their state implementation plans. Then-Administrator Ruckelshaus replied in a letter dated March 13, 1984, to Robert Abrams, the Attorney General of New York (C.A. App. 29):

> I do not believe that former Administrator Costle began a proceeding under section 115 of the Clean Air Act, though he may have made some of the findings that are necessary to such a proceeding. The most that can be said is that I might have discretion to begin such a proceeding.

4.a. In their complaint filed in district court on March 20, 1984, petitioners sought to have the court order the Administrator to determine which States were contributing to acid deposition in Canada and formally to notify them, within 30 days, that they must modify their SIPs pursuant to Section 115.[4] On

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[4] The complaint also requested that the Administrator be ordered to take action on petitions filed by three northeastern States in 1980 and 1981 requesting the Administrator to make a finding, pursuant to Section 126(b) of the Act, 42 U.S.C. 7426(b), that emissions from out-of-state sources were preventing attainment of air quality standards. The district court granted petitioners' motion for summary judgment on the Section 126 claims on October 5, 1984. On December 10, 1984, EPA published its final decision denying the Section 126 petitions at issue. 49 Fed. Reg. 48152. The States of New York, Pennsylvania, and Maine, joined by six other parties, petitioned for review of this final agency action, and those petitions are still pending in the court of appeals. *New York* v. *United States Environmental Protection Agency*, No. 84-1592 (D.C. Cir. argued Dec. 12, 1985).

July 26, 1985, the district court granted summary judgment in favor of petitioners, concluding that the International Joint Commission Report and the Costle letters satisfied all the prerequisites to the existence of a mandatory duty under Section 115 of the Act (Pet. App. A9-A29). Relying on the word "shall" in that Section, the court found that the Administrator had a mandatory duty to determine which States would have to revise their SIPs to prevent or eliminate the endangerment in Canada—a task the court characterized as merely "incidental to giving formal notification" (*id.* at A24 n.*). The district court therefore ordered EPA to determine, within 90 days, whether Costle's finding of reciprocity remained viable, and, within 180 days thereafter, to "formally notify[] the governors of any state in which such emissions originate" (*id.* at A43).[5]

b. A unanimous panel of the court of appeals reversed, holding that the Costle letters could not serve as the basis for judicial relief (Pet. App. A1-A8).[6] The court first noted that the present case involves an "unusual statute executed in an unexpected manner"

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[5] The Administrator filed a motion to modify the judgment, asserting that the 180-day period allowed by the court for identification and notification of the States was clearly insufficient. A declaration of the Acting Assistant Administrator for the Office of Air and Radiation estimated that the necessary analysis, program design, and notification would take a minimum of three years. By order dated September 20, 1985, the district court denied the motion to modify the judgment. However, the district court later granted a stay pending appeal of the portion of the judgment requiring formal notification of the States.

[6] The court of appeals granted the petitioners in No. 86-1374 leave to intervene on appeal.

(*id.* at A5). The court explained that Section 115 requires the Administrator to give formal notice of needed SIP revisions "to '*the* Governor' of '*the* State' " responsible for the international air pollution problem (Pet. App. A5 (emphasis added)); but, the court noted, "[i]n the context of a complex, multi-source pollution problem like acid deposition, identification of the problem does not necessarily bring with it identification of the blame-worthy states" (*ibid.*). If the statute had been executed in the manner Congress expected, the court concluded, the notice of endangerment, the reciprocity finding, and the SIP revision notices would have been issued simultaneously, and comment would have been requested and received on all of those issues at that time.

Here, however, because the actions of Administrator Costle separated the issues of endangerment and reciprocity from the identification of the responsible States, the court's task was to determine whether the findings that Costle did make "legally bind the current Administrator to issue SIP notices" (Pet. App. A5). The court held that they did not (*ibid.*). The court explained that if the findings were to bind subsequent EPA Administrators to issue SIP notices, the agency's statement would constitute a "rule" within the meaning of the Administrative Procedure Act, 5 U.S.C. 551(4), and it could be given binding effect only if it had been promulgated in compliance with the applicable notice and comment procedures in 5 U.S.C. 553, unless one of the exceptions of 5 U.S.C. 553(b)(A) was applicable (Pet. App. A6). The court found that the exceptions for "interpretative rules," "general statements of policy," and "agency organization, procedure, or practice" were inapplicable (*ibid.*). Accordingly, the court held "that if Administrator Costle's findings left the EPA no alterna-

tive but to issue SIP notices * * * —if they *forced* the EPA to take direct and substantial regulatory actions—they could not be promulgated without notice-and-comment procedures" (*id.* at A7 (emphasis in original)). For this reason, the court concluded that the findings do not create a non-discretionary duty on the part of the Administrator to issue notices to certain States, and therefore "cannot be the basis for the judicial relief [petitioners] seek" in this suit under 42 U.S.C. 7604(a)(2) (Pet. App. A8).

ARGUMENT

The decision of the court of appeals on the narrow question presented under the Administrative Procedure Act is correct and does not conflict with any decision of this Court or of any other court of appeals. Moreover, during the six years since the date of the letters and press release upon which petitioners rely, the subject of acid deposition has been—and continues to be—the focus of extensive bilateral discussions and study by the Governments of the United States and Canada. Accordingly, review by this Court is not warranted.

1. This case arises out of a disagreement concerning the appropriate course of action to address the exceedingly difficult and complex problem of acid deposition on the North American continent—a problem that has various sources and effects in both the United States and Canada and that therefore will require reciprocal efforts and continued cooperation by the two Nations. In 1981, then-Administrator Costle made a tentative determination that "the Section 115 authority could * * * be used to develop solutions" to the acid deposition problem (Pet. App. A36). Costle was careful to note, however, that Section 115

is actually activated only by giving formal notification to the Governor of a specific State and that EPA "has not yet determined which State or States will require notification" (Pet. App. A40). Costle's successors—Administrators Gorsuch, Ruckelshaus, and Thomas—have consistently interpreted his statements in 1981 as tentative or partial conclusions regarding the pre-conditions for a Section 115 proceeding, thereby leaving them with the discretion to determine whether, when, or how such a proceeding should commence. Costle's successors have thus far concluded that such a course would be unwise, because "any attempt to use Section 115 to control acid rain would bring about extensive regulatory and judicial proceedings that would create formidable obstacles to any practical results," and because "acid rain is a problem with such complexities and implications that any approach to it will almost certainly require legislative debate and Congressional enactment to be generally acceptable" (Letter from Administrator Ruckelshaus to New York Attorney General Abrams (C.A. App. 28-29)).

As Administrator Costle recognized, his statements in 1981 did not begin to address the complexities involved in tracing the cause of a certain portion of acid deposition in Canada to particular States and sources in the United States and in the quantification and allocation of emission reductions among States. Yet petitioners contend that Costle's general and tentative conclusions were sufficient to trigger a nondiscretionary duty on the part of the present EPA Administrator to perform those very tasks as a mere incident to notifying various States (which petitioners do not identify) that they must revise their SIPs. There is no indication that Congress intended

Section 115 to operate in such a rigid yet open-ended fashion—much less that Congress intended to create a judicially enforceable, mandatory duty to proceed as petitioners urge in the face of such indefinite circumstances. To the contrary, as the court of appeals observed (Pet. App. A5), Section 115 refers to the formal notification of "*the* Governor of *the* State in which the emissions originate" (emphasis added), thereby indicating that the nature and extent of a particular State's contribution should be ascertained, at least in general terms, before proceedings are commenced under that Section.

2. Quite aside from the difficulties occasioned by the terms of Section 115 standing alone, the Administrative Procedure Act precludes the relief petitioners seek. Because Administrator Costle did not follow the rulemaking procedures of the APA when he made the statements at issue here, and because no exception to those procedures applies in this setting, the Costle letters and press release do not give rise to a judicially enforceable, non-discretionary duty on the part of the current Administrator to commence proceedings under Section 115.

The court of appeals was clearly correct in holding (Pet. App. A7) that, if Costle's statements indeed have the force of law ascribed to them by petitioners, they constituted a "rule" within the meaning of the APA. The Administrative Procedure Act defines a rule as "an agency statement of general or particular applicability and future effect designed to implement * * * or prescribe law or policy" (5 U.S.C. 551(4)). See also U.S. Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* 14 (1947) [hereinafter *Attorney General's Manual*]. Moreover, contrary to petitioners' passing suggestion

(86-1373 Pet. 18 n.27), if Costle's statements have this legal effect of binding the EPA to a certain course of action, then the exceptions to the notice and comment rulemaking procedures for "interpretative rules" and "general statement of policy" clearly do not apply.[7] Those exceptions were included because general statements of policy and interpretation do not establish legal requirements independent of the statutes and existing regulations that the agency administers; they merely advise the public of the agency's construction of a statute or regulation or announce what the agency intends to establish as its policy in the administration of such a statute or regulation. See *Attorney General's Manual* 30 n.3; *Joseph* v. *United States Civil Service Comm'n*, 554 F.2d 1140, 1153 n.24 (D.C. Cir. 1977); *Pacific Gas & Electric Co.* v. *FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974). Such rules do not create new standards or requirements that have the force of law, as regards either the agency or private parties. They therefore cannot be thought to establish a non-discretionary duty on the part of the Administrator to take further action.

3. Petitioners argue (86-1373 Pet. 16; 86-1374 Pet. 17) that the court of appeals' decision conflicts with *Vermont Yankee Nuclear Power Corp.* v. *NRDC*,

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[7] Petitioners do not seriously contest the court of appeals' conclusion (Pet. App. A6) that none of the exceptions to the notice and comment requirements is applicable here. The petitioners in No. 86-1373 merely state in a footnote (Pet. 18 n.27) that they reserve the right, if certiorari is granted, to argue in the alternative that findings under Section 115 are exempt from notice and comment requirements as "general statements of policy." 5 U.S.C. 553(b)(A). However, because petitioners do not actually seek review of the court of appeals' holding on that question, it is not properly presented here.

435 U.S. 519 (1978). In *Vermont Yankee*, this Court held that "[a]bsent constitutional constraints or extremely compelling circumstances," courts are not free to require administrative agencies to employ procedures beyond those mandated by the Administrative Procedure Act or other applicable statutes (435 U.S. at 543-547). In the present case, however, the court of appeals did not require EPA, over its objection, to follow any particular procedures under Section 115; it merely required EPA to follow the minimal informal rulemaking procedures of the APA. In particular, the court of appeals did not require EPA to follow bifurcated rulemaking procedures under that Section, giving notice and seeking comments first on the endangerment and reciprocity issues and then later on proposed revisions in the SIPs of various States. The Administrator therefore remains free under the court of appeals' decision to combine the notice and comment procedures on all of those issues in a single proceeding, should he invoke the Section 115 mechanism in the future.

The court of appeals merely found that *if* Administrator Costle's 1981 findings were to be given the legally binding effect on his successors that petitioners (but not EPA) claimed, those findings would constitute a "rule" within the meaning of the Administrative Procedure Act and therefore could be given binding effect only if they *had* been promulgated in accordance with the rulemaking procedures in that Act. That holding in no way interferes with the implementation of Section 115 by the Administrator, who did not seek to give binding effect to the Costle letters and press release. The decision below thus is nothing more than a routine application of the statutory requirements of the APA to an individual in-

stance of agency action. It does not result in the unilateral imposition of additional procedural requirements by the courts, which was condemned in *Vermont Yankee*.

4. Petitioners also contend (86-1373 Pet. 20-21) that the court of appeals' decision undercuts the effectiveness of a number of environmental statutes that include triggering mechanisms for rulemaking. However, as we have just explained, the court of appeals did not impose additional requirements in the administration even of Section 115. Moreover, as the court of appeals observed, the present case involves "an unusual statute executed in an unexpected manner" (Pet. App. A5). Section 115 was originally enacted in 1965 as part of the Clean Air Act Amendments of that year (79 Stat. 995). The Section subsequently was amended in the Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 114, 91 Stat. 710. Under the earlier version of the statute, upon a finding that emissions from a source in the United States endangered the health or welfare of persons in a foreign country, notification was to be given to "the air pollution control agency of the municipality where such discharge or discharges originate," as well as to the "State in which such municipality is located" (79 Stat. 995). After notification, a conference was to be convened, to which the relevant foreign nation would be invited (*ibid.*). This predecessor to the current Section 115 indicates that it was primarily intended to provide a tailored response to identifiable sources of air pollution. The 1977 Amendments specified a different remedial response to international air pollution, by providing for the modification of the state implementation plan, instead of an enforcement conference, if there was transboundary pollution

"which may reasonably be anticipated to endanger public health and welfare." 42 U.S.C. 7415(a). But there is no indication in the text of the current version of Section 115, as there was none in the predecessor text, that Congress foresaw resort to that Section in the context of a multifaceted, multi-source problem such as acid deposition.

Moreover, the legislative history of these provisions amply demonstrates that Congress in fact assumed that the source of the offending emissions would be discrete and identified before the mechanisms of Section 115 were employed. 111 Cong. Rec. 25052 (1965) (remarks of Rep. Harris). And, although the Section was amended in 1977, at a time when the acid deposition problem was well known, highly controversial and acknowledged to be a difficult subject, there is no suggestion in the legislative history of the amendment to Section 115 that its provisions should be used to address the problem.[8] Nor did Congress add any provisions to Section 115—such as criteria or guidelines for identification of responsible sources and allocation of emission reductions among those sources—that might support the notion that Congress intended to impose a mandatory duty on the Administrator to invoke Section 115 to attack a problem such as acid deposition.

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[8] The committee reports on the 1977 Amendments speak of acid rain in connection with use of tall stacks (see H.R. Rep. 95-294, 95th Cong., 1st Sess. 85-86 (1977)) and provisions for the prevention of significant deterioration (*id.* at 130-132). Congress also knew that no method existed for linking emissions in a particular area with acid deposition in another area. See 122 Cong. Rec. 23964 (1976) (remarks of Senator Muskie).

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Accordingly, this case does not present the question of whether the threshold findings that trigger the obligation to conduct a rulemaking proceeding under various other environmental statutes are themselves rules that must be promulgated in accordance with notice and comment requirements.[9] Instead, this case involves findings that are claimed to commit EPA to using the procedures of Section 115 to attempt to rectify the problem of acid deposition. As demonstrated above, in order to permit Section 115 to be used for that purpose, there are significant policy and technical determinations of a discretionary nature that would have to be made even after the Administrator had made findings of endangerment and reciprocity. Accordingly, if Administrator Costle's findings were to be construed as a commitment that EPA, as a matter of policy, would use the procedures of Section 115 and that succeeding Administrators were to be denied the discretion to determine as a matter of policy that such a course would be unwise or counterproductive, then at the very least any findings could be given that extraordinary effect only if they were promulgated after following the notice and comment procedures that are a necessary prerequisite to an agency's making a binding commitment to a particular regulatory course of action. See *Guardian Federal Savings & Loan* v. *Federal Savings & Loan Insurance Corp.*, 589 F.2d 658, 666-667 (D.C. Cir. 1978).

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[9] We note, as did the court of appeals (Pet. App. A5), that in many instances the threshold findings and the proposed regulations are announced simultaneously, and comments on both are solicited and received together. See *National Asphalt Pavement Ass'n* v. *Train*, 539 F.2d 775 (D.C. Cir. 1976).

5. Finally, the court of appeals' decision did not, as petitioners assert (86-1373 Pet. 15), "void" Administrator Costle's determinations regarding harm and reciprocity. The court merely ruled that those findings could not support the judicial relief requested by petitioners under Section 304(a)(2) of the Act, 42 U.S.C. 7604(a)(2) (Pet. App. A8). As then-Administrator Ruckelshaus stated in response to petitioners' notice of intent to sue in 1984, and as affirmed by the court of appeals (Pet. App. A8), EPA retains the discretion to commence a proceeding under Section 115 to address the acid deposition problem if it determines that the technical and policy problems involved are amenable to resolution in such a proceeding. In the meantime, the Agency is acting to fulfill the congressional mandate, embodied in the Acid Precipitation Act of 1980, 42 U.S.C. 8901 *et seq.*, to develop the necessary scientific data to inform future efforts to resolve the acid deposition problem. At the same time, the United States and Canada are proceeding with their bilateral efforts to address that issue—which include, for this Nation's part, a commitment to seek the dedication of $2.5 billion in public funds and an additional $2.5 billion in private funds to develop appropriate control technology. In these circumstances, review by this Court would not contribute significantly to the resolution of the acid deposition problem. Nor would it resolve any question of wider importance in the execution of this Nation's environmental laws.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

F. HENRY HABICHT II
Assistant Attorney General

DAVID C. SHILTON
ANNE S. ALMY
Attorneys

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